be exercised in contravention of state law if state law is sought to be applied to prevent the execution of a policy designed to promote the general welfare (cf. Appellees' Br. 67). *Gerlach* stated that the power is:

> "limited only by the requirement that it shall be exercised for the common benefit as distinguished from some mere local purpose."

That the general welfare power, validly exercised, has the same attributes as any other federal power, i.e., that it too enjoys the benefit of the supremacy clause, can be inferred from the following cases: *Cleveland v. United States*, 323 U.S. 329, 333 (1945), which held that a federal housing project is entitled to immunity from local taxation as a sovereign activity of the United States; and *Berman v. Parker*, 348 U.S. 26 (1954), as applied outside the District of Columbia in *Starr v. Nashville Housing Authority*, 354 U.S. 916 (1957), which held that the power of eminent domain may be exercised for a general welfare purpose.

Kansas v. Colorado, 206 U.S. 46, 92 (1907), is now wrong if taken as indicating that the United States lacks a "definite grant of power [to] enter the territory of the states . . . and legislate in respect to improving by irrigation or otherwise the lands within their borders." It is disproven by the housing cases and *Gerlach*, which latter says expressly that the general welfare power is "a power separate and distinct from those later enumerated" (339 U.S. at 738).

An obvious question is why, in view of the long-standing arguments between state and nation in water

resource development, a state should now appear as an exponent of federal authority? The brief and realistic answer is that federal-state cooperation is inevitable if the states are to play a vital and constructive role. Even California, which has made more efforts in this field than most states (McKinley, *The Management of Water Resources Under The American Federal System*, reprinted in McMahon ed., Federalism Mature and Emergent, 328, 332, 334-335 (1955)), has been unable up to now to build water projects by itself. While increased state activity in the future is planned and hoped for, even if it occurs no one expects California to satisfy its growing water needs without substantial federal assistance. Responsible representation of the state's interest, therefore, requires preservation of the power and mechanics of federal cooperative activity and resistance to fanciful constitutional objections. A ruling that the general welfare power authorizes the program under attack in these cases would still leave the state free to go it alone if it chose to do so. But a contrary ruling could frustrate the only means which have thus far been effective to do the big jobs of water development that must be done.

IV. THE ACREAGE LIMITATION DOES NOT TAKE PROPERTY WITHOUT DUE PROCESS OR DENY EQUAL PROTECTION

The appellees, using the *Albonico* case as their medium, attack the constitutionality of the acreage limitation with the argument that under the contracts the excess land will be assessed *ad valorem* (Appellees' Br. 82), but will be denied the "right to have benefits in return for assessments" (Appellees' Br. 86).

The appellees have made an egregious error of fact. They say that in the *Albonico* case, "No evidence was introduced to show that the lands would be benefited by the operation of the district if a water supply was refused to them (R. 412)" (Appellees' Br. 79).

Actually, the Albonicos brought a proceeding before the board of directors of the Madera District to have their excess lands excluded under California Water Code sections 26700-26780 on the theory they were not benefited (R. 405). The board found that the excess lands would be benefited, despite the absence of surface deliveries (R. 406). The Albonicos sought judicial review of this finding. In the review proceedings and subsequent appeals, principal questions were the correctness of the trial court's finding of absence of benefit, the scope of its authority to review the finding of the district board on the question of benefit and the proper disposition of the case if the board's finding was not correct. (We have asked that the briefs in the *Albonico* case, which show the issues raised, be included to augment the record heretofore supplied.) Thus, quite contrary to the appellees' statement (Appellees' Br. 79), one of the very points in issue was whether there was evidence to show benefit despite absence of surface deliveries and whether the trial court's finding they rely on was correct. Because of the way the California Supreme Court disposed of the case, these questions have never been resolved.

In this attack on the acreage limitation, the appellees are not only going beyond the opinion of the

California Supreme Court, they are also in conflict with one of its key holdings. In the *Santa Barbara* case, the present appellees contended that lands not directly served with water would be deprived of property without due process of law if subjected to *ad valorem* taxes (47 Cal.2d 711, 306 P.2d 882-883, AJS 218). The California court rejected this argument and held on the authority of previous California cases that indirect benefits, such as the "improvement of neighboring and surrounding land and the consequent increase in the value of all land within the district," are a sufficient constitutional basis for the levy of *ad valorem* taxes (47 Cal.2d 712, 306 P.2d 883, AJS 220).

Moreover, land can be directly benefited without surface deliveries due to the improvement in ground water conditions which can result from project operations. Indeed, the very argument that the acreage limitation is impossible to enforce arises from the fact that ground water benefits may be available to all owners, large and small (Hearings before Senate Committee on Public Lands on S. 912, 80th Cong., 2d Sess. 1218-1222 (1944)). The Chief Engineer of the Madera District stated:

> "EXCESS LANDS WILL BENEFIT FROM SURFACE IRRIGATION
>
> "There appears to be no doubt, therefore that with introduction of surface irrigation and the consequent cessation of pumping by those using surface water, excess lands will receive direct benefits in the way of a higher water table, with consequent improvement in quality, plus lower pumping costs, and above all, reasonable assur-

ance that the water table will not fall to the danger point" (*Id.* 1221).

The contracts expressly take the possibility of underground benefits to large owners into account in standard clauses (R. 37, 213, 498, cf. 528, 561):

> "(b). If Project water furnished to the District pursuant to this contract reaches the underground strata of excess land owned by a large land owner who has not executed a recordable contract and the large land owner pumps such Project water from the underground, the District will not be deemed to have furnished such water to said lands within the meaning of this contract if such water reached the underground strata of the aforesaid excess land as an unavoidable result of the furnishing of Project water by the District to nonexcess lands or to excess lands with respect to which a recordable contract has been executed."

Of course, it is possible that the excess lands may not be benefited in the same degree as the lands receiving a surface supply. But the law provides for a special rate of assessments (Calif. Water Code § 25825) and assessment in accordance with benefits (Calif. Water Code § 23242). Thus, assuming that the method actually used in most districts of a combined *ad valorem* assessment and toll charge for water results in a disproportion of payments to benefits, the way is open to the excess landowners to have this corrected.

A complaint is made that the Albonicos paid their assessment for years but are now receiving no benefit

(Appellees' Br. 77, 78). Assuming the unlikely fact that they are receiving no benefits, they have no cause for complaint because they either had or have a remedy if it has not been barred by lapse of time. Irrigation district charges are generally considered special assessments (*San Diego v. Linda Vista Irr. Dist.*, 108 Cal. 189, 41 Pac. 291 (1895)). If the project which was to result in the benefit has been abandoned and no benefit is forthcoming, as the appellees seek to argue, an ordinary action will lie to recover the payments (*District of Columbia v. Thompson*, 281 U.S. 25 (1930); *Chapman v. Los Angeles*, 26 Cal.App.2d 186, 79 P.2d 128 (1938)).

The appellees have identified a number of other purported property rights which they contend are taken without due process from "excess" landowners under the acreage limitation (Appellees' Br. 83-84). Although they have listed "rights" which the California Supreme Court did not even mention in its opinions,[8] no detailed response to their argument is necessary in light of the discussion in our opening brief (pp. 52-54, 61-63).

However, certain factual errors should be noted. It is said, "The Albonicos further ascertained that:

> "'. . . the administrative procedure usually adopted has been to refuse to deliver water to any lands, excess or non-excess, until the owner of the excess land has executed a recordable contract agreeing to dispose of the excess.' (Land Ownership Survey on Federal Reclamation Proj-

[8]The "rights" listed as numbers (3), (4), and (5), Appellees' Br. 84.

ects, Department of Interior (1946), p. 47, Exh. 47 in Madera, Rep. Tr. 43.)" (Appellees' Br. 79).

In the Central Valley and Santa Barbara Projects an excess landowner will receive water for his non-excess lands whether he enters into a recordable contract or not. Any inference to the contrary from the statement quoted by the appellees is expressly negatived by the records herein and material quoted by the appellees themselves. The owner is allowed to designate his non-excess lands and receive water for them. And if he fails to make a designation it will be made for him (R. 39-40, 500-501; Appellees' Br., Appendix p. 2).

The appellees have persistently stated that the acreage limitation restricts the furnishing of "water or service from the district" (Appellees' Br. 85, 86) and "the district's water supply" (Appellees' Br. 87), and that the contract "precludes landowners from receiving state-controlled water for their lands in excess of arbitrarily prescribed limits" (Appellees' Br. 87). The important qualification, that only water or service *furnished through federally financed and constructed works* is so restricted, is not mentioned. This omission, of course, utterly distorts the effect of the limitation.

The appellees also stated that:

> ". . . the argument is sometimes used that lands which do not receive a direct benefit from the district operations nevertheless receive an indirect benefit by an increase in their value due to district operations. Such, however, is not the case

> under the contracts now before the Court, because the contracts specifically limit the sale price of 'excess land' to a price which does not reflect any present or prospective benefit that the land would receive by reason of the project, its works, or any water delivered therefrom. (R. 214)" (Appellees' Br. 86-87).

The record reference cited by the appellees does not support their statement. The contract provision which they referred to is as follows (R. 214):

> The following principles shall govern the appraisal [of excess land];
>
> "(i) No value shall be given such lands on account of [fol. 47] the existing or prospective possibility of securing water or service from the distribution system;"

There is nothing in this language which forbids the appraisal from taking into account the increased value resulting from the general improvement of property values in the surrounding area which may result from the project.

When the limitation is correctly understood, it is seen that it operates only to the extent that water delivery is desired by means of subsidized projects built with money belonging to all the people of the United States, to the end of distributing the project benefits widely and equitably. Thus, disappointing and distasteful as the limitation may be to owners of excess land, its compatibility with due process and equal protection cannot be doubted.

CONCLUSION.

For the reasons stated in our opening brief and in this brief, it is respectfully submitted that this court should take jurisdiction of these cases and that the judgments of the Supreme Court of California should be reversed.

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Respectfully submitted,

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(Appendix Follows.)